

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

Agenda ID 14258
RESOLUTION E-4468
October 1, 2015

R E S O L U T I O N

Resolution E-4468. Southern California Edison, Pacific Gas and Electric, and San Diego Gas & Electric request approval of their Model Protective Order and Model Nondisclosure Agreement.

PROPOSED OUTCOME:

- This resolution approves the Model Protective Order (“MPO”) and Model Nondisclosure Agreement (“MNDA”), with modifications.

SAFETY CONSIDERATIONS:

- There is no impact on safety.

ESTIMATED COST:

- There is no cost impact.

By Advice Letter (“AL”) Pacific Gas and Electric Company (“PG&E”) AL 3943-E, Southern California Edison Company (“SCE”) AL 2653-E, and San Diego Gas & Electric Company (“SDG&E”) AL 2301-E, filed on November 10, 2011.

SUMMARY

PG&E, SCE and SDG&E (collectively the “joint utilities”) request that the California Public Utilities Commission (“CPUC”) approve the final drafts of a proposed MPO¹ and MNDA² (together, the “Proposed Models”), as required by

¹ MPO is an order signed and dated by an Administrative Law Judge (ALJ) that governs access to and the use of market sensitive information produced by, or on behalf of, any Disclosing Party in a proceeding.

D.11-07-028, ordering paragraphs 5 and 6. The MPO and MNDA ensure the confidentiality of the joint utilities' market sensitive electric and gas procurement information. This Resolution approves the Proposed Models with modifications to establish that the party seeking confidential treatment bears the burden of proving entitlement to such treatment.

BACKGROUND

1. The MPO and MNDA

The joint utilities filed the above-captioned Advice Letters in response to the requirements of D.11-07-028, which dealt with access by market participants to the utilities' market sensitive information. That decision modified earlier decisions with regard to the conditions under which market participants could have access to such information. It required that market participants obtain confidential data via "Reviewing Representatives," as defined below, but changed earlier requirements for Reviewing Representatives.

Due to this change, the decision ordered an update to the MPO approved in D.03-04-023: "[t]he Model Protective Order adopted in D.08-04-023 now needs to be updated, to reflect the changes in our confidentiality rules approved in this decision." D.11-07-028, *mimeo* at 5. The decision also found that an MNDA would be appropriate for use in connection with the use of market sensitive information. *Id.* at 6. The Commission ordered the parties to meet and confer and attempt to agree on consensus versions of both documents.

In their Advice Letters, the joint utilities each described the meet and confer process that took place, but indicated that the parties were not able to resolve all language in the proposed documents. As discussed in more detail below, the areas of dispute were the following:

² MNDA is the actual agreement signed by a requesting party and a disclosing party to abide by the terms of the MPO in handling market sensitive information.

1. Independent Energy Producers (IEP) disputed the use of the term “Protected Materials” in the Proposed Models.
2. The parties disagreed on the process for determining whether a designated individual is an appropriate Reviewing Representative.
3. IEP expressed concern about the amount of time that a party disclosing documents was provided to object to an identified Reviewing Representative.

We modify the joint utilities’ Proposed Models to address each of these issues.

2. *The Underlying Proceeding*

The proceeding giving rise to the joint utilities’ Advice Letters, Rulemaking (R.) 05-06-040, was opened in the wake of the California energy crisis of 2000-2001, which was the result of market manipulation of the California energy market. Among many other legislative initiatives taken after the crisis, the Legislature enacted Public Utilities Code § 454.5(g) to require the CPUC to adopt procedures to ensure the confidentiality of market sensitive information related to the joint utilities’ procurement of resources to serve their customers:

The Commission shall adopt appropriate procedures to ensure the confidentiality of any market sensitive information submitted in an electrical corporation's proposed procurement plan or resulting from or related to its approved procurement plan, including, but not limited to, proposed or executed power purchase agreements, data request responses, or consultant reports, or any combination....

Concerned with the treatment of confidential information, the Legislature later passed Senate Bill (“SB”) 1488, which required the CPUC to examine its practices under §§ 454.5(g), 583 and the California Public Records Act (“CPRA”) to ensure that they provided for meaningful public participation and open decision making, while balancing the competing need to protect the release of certain market sensitive information.

Through a series of decisions in R.05-06-040, the Commission implemented SB 1488. Some of those decisions were the subject of Applications for Rehearing. Most germane to this Resolution, D.11-07-028 modified earlier decisions regarding market participants' access to joint utilities' market sensitive documents. The decision modified earlier decisions in the following key respects:

1. It clarified that *all* market participant parties can participate in Commission proceedings through the use of Reviewing Representatives.
2. It specified that although Reviewing Representatives may not be employees of a market participant enterprise, market participants may employ outside representatives, such as attorneys, consultants, and experts to serve as Reviewing Representatives, provided that these Reviewing Representatives abide by the Commission's confidentiality requirements with respect to all confidential market sensitive information.
3. It explained who can act as a Reviewing Representative, and
4. It modified the status of certain parties with respect to whether the party is a market participant or non-market participant.

To accommodate these changes, the Commission directed the parties to work together collaboratively to develop a consensus version of an MPO that was updated from the one previously approved in D.08-04-023 to conform to D.11-07-028's changes. The Commission also ordered the parties to use the same process to come up with a proposed MNDA. The utilities were ordered to submit these documents via a joint Advice Letter for CPUC approval by Resolution.³

To meet the requirements of the order, the joint utilities, in collaboration with other parties in R.05-06-040, developed revised draft versions of the Proposed Models for CPUC approval. The joint utilities submitted the Advice Letter on November 10, 2011, seeking CPUC approval for the Proposed Models, attached as Appendices A and C thereto.

³ D.11-07-028 at 41.

NOTICE

Notice of PG&E's Advice Letter 3943-E, SCE's Advice Letter 2653-E, and SDG&E's Advice Letter 2301-E was provided by publication in the CPUC's Daily Calendar. PG&E, SCE, and SDG&E state that a copy of the Advice Letter was mailed and distributed in accordance with Section 3.14 of General Order 96-B.

PROTESTS

The Independent Energy Producers Association ("IEP") filed a protest to ALs 3943-E, 2653-E, and 2301-E on November 30, 2011, and stated that the Proposed Models would:

- Nullify key provisions of D.06-06-066 without proper notice and opportunity to be heard;
- Impose a different standard for justifying claims of confidentiality using the original model's term "Protected Materials" rather than the permitted term "Market Sensitive Information" in the definition. By defining "Protected Materials" expansively, IEP alleged the proposed model covered more than the Commission intended;
- Reverse the burden of proof for confidential treatment by shifting the burden away from the party claiming the privilege to the party seeking release of materials; and,
- Cause excessive claims of confidentiality and a denial of public access to information used in CPUC proceedings.

IEP urged the CPUC to reject the Advice Letters and instruct the utilities to re-convene the process to develop another MPO and MNDA.

PG&E, SCE, and SDG&E filed a joint response to the IEP protest on December 7, 2011, and provided the following responses:

- By focusing on whether the definition of "Protected Material" in the proposed MNDA and MPO is too broad, IEP ignores the fact that the

proposed MNDA and MPO were the result of a collaborative effort in which non-IOU parties participated;

- IEP's arguments are legally incorrect, ignore existing CPUC decisions, and would result in significant administrative burdens;
- The CPUC approved an MPO in D.08-04-023 that defined Protected Materials to include trade secrets, market-sensitive information, and other confidential information (as do the Proposed Models). The Commission protected such information in D.06-06-066. IEP did not seek rehearing or modification of D.08-04-023 with regard to the definition of Protected Materials, and D.11-07-028 did not change this definition;
- The Commission's direction in D.11-07-028 was only that the existing MPO be modified to address changes adopted in D.11-07-028, primarily regarding the definition of Reviewing Representative; and
- Requiring the parties to engage in further informal meetings would unnecessarily delay the process. Because the parties were unable to resolve their all disagreements over a four-month period, there was no reason to believe the parties could reach resolution.

DISCUSSION

The Proposed Model should be approved with modification.

We have evaluated whether the Proposed Model complies with the requirements specified in D.11-07-028. The only changes that decision ordered related to *who* could review documents. It did not change the *types of documents* to be covered by an MPO or MNDA. Thus, we reject the arguments by IEP claiming that the definition of what may be covered by the MPO or MNDA should be narrower than what the IOUs propose. D.11-07-028 simply did not deal with that issue, and thus the earlier decisions which defined covered material stand. D.06-06-066 (as modified) provided the definition of material to be protected, and D.08-04-023 adopted that definition in an MPO, as follows:

A. The term "Protected Material(s)" means (i) trade secret, market sensitive, or other confidential and/or proprietary information as determined by the Disclosing Party in accordance with the provisions of D.06-06-066 and subsequent decisions, General Order 66-C and 454.5(g), or any other right of confidentiality provided by law, or (ii) any other materials that are made subject to this Protective Order by the Assigned ALJ, Law and Motion Administrative Law Judge ("Law and Motion ALJ"), Assigned Commissioner, the Commission, or any court or other body having appropriate authority. Protected Materials also includes memoranda, handwritten notes, spreadsheets, computer files and reports, and any other form of information (including information in electronic form) that copies, discloses, or compiles other Protected Materials or from which such materials may be derived (except that any derivative materials must be separately shown to be confidential). Protected Materials do not include: (i) any information or document contained in the public files of the CPUC or any other state or federal agency, or in any state or federal court; or (ii) any information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order or any other protective order.⁴

No parties have contested whether the MPO and MNDA appropriately incorporate provisions for "Reviewing Representatives" as required by D.11-07-028, and we therefore conclude that the Proposed Models sufficiently implement the Reviewing Representative provisions of that decision.

We disagree with IEP that only market sensitive information should be covered in the Proposed Models. IEP claims that use of the terms "protected information" is overly broad and inconsistent with statute and the totality of

⁴ D.08-04-023, Appendix A ("Model Protective Order,)" available at: http://docs.cpuc.ca.gov/published//FINAL_DECISION/94608.htm

prior Commission decisions. D.11-07-028 makes clear that the definition of materials protected as a result of R.05-06-040 is already contained in D.08-04-023:

We adopted the Model Protective Order after balancing our statutory obligation pursuant to § 454.5(g) to ensure the confidentiality of “market sensitive information,” and the competing interest in broad public access to public information and meaningful participation in our proceedings, and after carefully identifying what specific data is properly classified as “market sensitive” and subject to these special protections. D.08-04-023 and the terms of the Model Protective Order are appropriately limited to “market sensitive information” that is the focus of § 454.5(g) and this rulemaking; thus it is limited to information that can be identified by the Matrix adopted in D.06-01-066 (sic) as modified by D.07-05-032 and subsequent decisions.

Therefore, D.11-07-028 did not change the definition of covered materials approved in D.08-04-023, and this Advice Letter is not an appropriate place to challenge that determination.

Thus, we agree that the Proposed Models should continue to limit access and use of materials defined as follows:

For purposes of this Protective Order, the term “Protected Materials” means: (i) trade secret, market sensitive, or other confidential and/or proprietary information as proved by the Disclosing Party in accordance with the provisions of Decision (“D.”) 06-06-066 and subsequent decisions, General Order 66-C, Public Utilities Code section 454.5(g), or any other right of confidentiality provided by law; or (ii) any other materials that are made subject to this Protective Order by the Assigned Administrative Law Judge (“Assigned ALJ”), Law and Motion Administrative Law Judge (“Law and Motion ALJ”), Assigned Commissioner, the California Public Utilities Commission (“Commission”), or any court or other body having appropriate authority.

IEP erroneously relies on ordering paragraph 9 of D.11-07-028 to assert that the decision changed the holding in D.08-04-023. That ordering paragraph, however, derives from the foregoing quoted material, which makes clear that the conclusion in D.08-04-023 was *correct*.

The Proposed Models should be modified to clarify that the party seeking protection bears the burden of proving that information requires confidential treatment.

IEP argues that the Advice Letter proposal attempts to reverse the burden of proof that information requires confidential treatment, and deny public access to information used in the CPUC proceedings. D.06-06-066 (as modified) made clear that the party seeking confidentiality protection always bears the burden of proving that it is entitled to confidential treatment. Merely stamping documents “confidential,” “market sensitive” or “protected materials” does not meet this burden. Rather, the party asserting confidentiality must explain, as to individual records, why they meet the definitions of confidential materials. Nothing in D.11-07-028 modified that earlier holding,⁵ and, therefore, if records meet the definition of confidential materials that are protected, then the party asserting confidentiality must meet the burden of proof established in that Decision. D.11-07-028 further clarified that “in the event that the Commission or other appropriate authority has not identified particular information as market sensitive, a party’s designation of information as ‘market sensitive’ is not controlling.” Therefore, if a party believes that the disclosing party has made excessive claims of confidentiality, a party may file a motion to challenge an erroneous or excessive designation.

The Proposed Models erroneously provide that simply designating “Protected Material” is adequate to ensure confidentiality. *See, e.g.*, [Model] Protective Order submitted by PG&E with AL 3943-E, Section 3, p. 5

⁵ The Commission currently is examining its practices under the California Public Records Act and General Order 66-C, but has not yet reached a decision. *See* R.14-11-001.

("[w]hen filing or providing in discovery any documents or items containing Protected Material, a party shall physically mark such documents ... as "PROTECTED MATERIALS SUBJECT TO PROTECTIVE ORDER," or with words of similar import as long as one or more of the terms "Protected Materials" or "Protective Order" is included in the designation to indicate that the materials in question are Protected Materials. All materials so designated shall be treated as Protected Materials unless and until: (a) the designation is withdrawn..., (b) an Assigned ALJ, Law and Motion ALJ, Assigned Commissioner, or the Commission makes a determination that (i) the document does not contain Protected Materials or does not warrant confidential treatment or (ii) denies a motion to file the document under seal; or (c) the document or information becomes public knowledge, other than through disclosure in violation of this Protective Order or any other nondisclosure agreement or protective order.") (Emphasis added.)

The foregoing paragraph suggests that merely marking material as "Protected" is sufficient to establish a right to confidentiality. The IOUs shall modify the MPO and MNDA they submitted to make clear that the party seeking confidentiality has the burden of making such a showing, and that merely marking a document "Protected" without explanation does not meet that burden. A designation may be challenged at any time by the party seeking release, and the Disclosing Party bears the burden of showing why the document should be protected. Furthermore, if the Commission has not previously identified information as market sensitive, such a designation would need to be requested before such material could be marked as "Protected" under the terms of the MPO and MNDA.

Finally, no parties have contested whether the Proposed Models appropriately and sufficiently address who may review documents, with regard to Reviewing Representatives. Therefore, no further discussion of this topic is needed, and the CPUC is satisfied that the parties have complied with the requirement in D.11-07-028.

We reject IEP's proposal to re-convene the collaborative process.

D.11-07-028 required parties to convene a collaborative process designed to achieve consensus on updated versions of the MPO and MNDA. We are satisfied that that they did so by circulating for comment draft versions of the documents, hosting two conference calls and then recirculating the final proposed versions to all parties in R.05-06-040 prior to filing the advice letters. We agree with the joint utilities that if the parties were unable to resolve this dispute over a four-month period; there is no reason to believe that these same parties could reach resolution on this issue if informal discussions are reconvened. Therefore, the request by IEP to re-convene is denied.

We approve the revised draft MPO and MNDA, and decline IEP's request that the collaborative process ordered in D.11-07-028 be re-convened.

COMMENTS

Public Utilities Code Section 311(g)(1) provides that this Resolution must be served on all parties at least 30 days prior to a vote by the CPUC, to provide an opportunity and subject to at least 30 days public review and comment prior to a vote of the CPUC. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day comment period for the draft of this Resolution was neither waived nor reduced. Accordingly, this draft resolution was mailed to parties for comments, and will be placed on the CPUC's agenda no earlier than 30 days from today.

FINDINGS

1. The CPUC issued Decision (D.) 11-07-028 to clarify confidentiality procedures by allowing market participants to participate in the CPUC proceedings through Reviewing Representatives.
2. D.11-07-028 did not change the definition of material entitled to confidentiality protection reached in earlier decisions issued in the same proceeding, Rulemaking 05-06-040.

3. On November 10, 2011, PG&E (Advice Letter 3943-E), SCE (Advice Letter 2653-E), and SDG&E (Advice Letter 2301-E) filed Advice Letters for CPUC approval of the proposed Model Protective Order (“MPO”) and Model Nondisclosure Agreement (“MNDA”).
4. IEP filed protests to PG&E’s Advice Letter 3943-E, SCE’s Advice Letter 2653-E, and SDG&E’s Advice Letter 2301-E on November 30, 2011.
5. The joint utilities filed a response to the IEP protest on December 7, 2011.
6. The CPUC is satisfied that parties have convened a collaborative process designed to achieve consensus on updated versions of the MPO and MNDA.
7. The CPUC rejects IEP’s proposal to re-convene the collaborative process.
8. The proposed MPO and MNDA sufficiently implement the “Reviewing Representative” provisions of D.11-07-028.
9. The definition of the material protected by the MPO and MNDA meets the requirements of D.06-06-066, D.08-04-023 and D.11-07-028.
10. The party seeking confidential treatment always bears the burden of proving entitlement to such protection. Merely stamping documents “confidential,” “market sensitive” or “protected material” is inadequate to meet this burden of proof. D.11-07-028 did not alter this earlier conclusion reached in D.06-06-066, as modified.
11. The IOUs shall modify the MPO and MNDA (as appropriate) to specify that the party seeking confidentiality bears the burden of proving such entitlement, and that merely marking records as noted in the preceding paragraph is insufficient to meet that burden. They shall file the revised documents in a Tier 1 Advice Letter.

THEREFORE IT IS ORDERED THAT:

1. Pacific Gas & Electric, Southern California Edison and San Diego Gas & Electric’s proposed Model Protective Order and Model Nondisclosure Agreement are approved, with modification to provide that the party seeking confidentiality bears the burden of proving such entitlement, and that merely marking records as noted in the preceding paragraph is insufficient to meet that burden.

2. Pacific Gas & Electric, Southern California Edison and San Diego Gas & Electric shall file the revised documents in a Tier 1 Advice Letter within 30 days of the effective date of this resolution.
3. The Independent Energy Producers Association's request for parties to re-convene the collaborative process ordered in D.11-07-028 is denied.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on October 1, 2015; the following Commissioners voting favorably thereon:

TIMOTHY J. SULLIVAN
Executive Director